Supreme Court U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAPITAL CURRENCY EXCHANGE, N.V., doing business as Chequepoint USA, and CHEQUEPOINT WORLDCASH, INC.,
Petitioners,

v.

NATIONAL WESTMINISTER BANK PLC,
BARCLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that this Court's decision in *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948), holding that district courts do not have the power to dismiss suits brought under the Sherman Act on the ground of *forum non conveniens*, "is no longer good law."

2. Whether actions brought under the Sherman Act may be dismissed on the ground of *forum non conveniens*.

3. Whether England is an adequate alternative forum for the petitioners' claims brought under the Sherman Act, notwithstanding that an English court will not apply the Sherman Act, and will not have subject-matter jurisdiction under the purportedly "analogous" provisions of the Treaty of Rome.

RULE 29.6 STATEMENT

All of the parent companies of the petitioners are privately held; none of them has any publicly issued securities.

Neither petitioner has any nonwholly owned subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Capital Currency Exchange, N.V., doing business as Chequepoint USA, and Chequepoint Worldcash, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-17a) is reported at 155 F.3d 603. The opinion of the district court (18a-22a) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 16, 1998 (24a-25a). The court of appeals denied a peti-

tion for rehearing on November 17, 1998 (23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides, in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 12 of the Clayton Act, 15 U.S.C. § 22, provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or whenever it may be found.

28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Article 85 of the Treaty of Rome provides, in relevant part:

> The following shall be prohibited as incompatible with the common market: all agreements between

> undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . .

Article 86 of the Treaty of Rome provides, in relevant part:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. . . .

STATEMENT

Petitioners filed a complaint in the United States District Court for the Southern District of New York on August 23, 1996, alleging that the five corporate and individual respondents violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 and 2, by agreeing not to do business with the petitioners. Petitioners also pled certain common law claims against some of the respondents. The district court had subject matter jurisdiction pursuant to 15 U.S.C. § 15(a), and 28 U.S.C. §§ 1331, 1337 and 1367.

All respondents moved to dismiss the complaint on the grounds of *forum non conveniens* and failure to state a claim. The individual respondents also moved to dismiss the complaint on the ground of lack of personal jurisdiction. In connection with their claim of *forum non conveniens,* the respondents argued that England is an adequate alternative forum for the petitioners' claims. Although the respondents conceded that an English court would not apply the Sherman Act, they contended that the petitioners could bring similar claims in an English court under Articles 85 and 86 of the Treaty of Rome.

The petitioners opposed these motions. With respect to *forum non conveniens,* the petitioners relied upon this

Court's ruling in *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*"), that district courts do not have the power to dismiss suits brought under the Sherman Act on the ground of *forum non conveniens*. The petitioners also argued that even if the district court had this power, England would not be an adequate alternative forum for the petitioners' claims because an English court would not apply the Sherman Act, and the petitioners' claims do not satisfy the subject-matter jurisdictional threshold of Articles 85 and 86 of the Treaty of Rome. Specifically, Articles 85 and 86 are applicable only where anticompetitive agreements or conduct "affect trade between Member States" of the European Community, but the petitioners' complaint alleges only that the respondents' anticompetitive conduct has affected trade between England and the U.S., and within the U.S. Indeed, because the petitioners only do business in the U.S., they have no basis for alleging that the respondents' conduct has affected trade among Member States. Hence, dismissal of the petitioners' Sherman Act claims in the U.S. would leave them with no forum in the world where they could pursue their claims against the respondents.

In August 1997 the district court granted the respondents' motion to dismiss the complaint on the ground of *forum non conveniens*. It did not rule upon, or even address, the other bases for the respondents' motions.

The court of appeals affirmed the district court's decision, holding that *National City Lines I* "is no longer good law" in light of 28 U.S.C. § 1404(a), which permits district courts to transfer civil actions, including Sherman Act actions, from one district to another. (8a) The court of appeals acknowledged that its decision conflicts with two decisions by the Fifth Circuit holding that *National City Lines I* bars dismissal of Sherman Act actions on the ground of *forum non conveniens*. (9a-10a) The court of appeals' decision also conflicts with a decision by the United States District Court for the District of Columbia.

A. The Parties and Their Relationships

Petitioner Chequepoint Worldcash, Inc. ("Worldcash") is a New York corporation and has its principal place of business in New York. Since 1991, it has been licensed by the New York State Banking Department to engage in the business of receiving money from, and transmitting money to, points within and without the United States. Petitioner Capital Currency Exchange, N.V. ("CCE") is an affiliate of Worldcash, and also has its principal place of business in New York, although it is incorporated in the Netherlands Antilles. It has operated currency exchange facilities in New York since 1985.

CCE, Worldcash and related companies in Asia and Europe constitute the world's largest independent retail currency exchange organization. CCE and Worldcash, however, operate and transact business only in the United States; neither operates or transacts business in England, or in any other Member State of the European Community.[1] CCE and its foreign affiliates transact their currency exchange business under the registered trademark "CHEQUEPOINT."

Petitioners compete with banks with respect to both currency exchange and money transfers, but they are also dependent upon banks for certain services. For example, in 1991, to obtain a money transmission license under New York Banking Law Article XIII-B, Worldcash had to furnish a $500,000 bond in favor of the New York Superintendent of Banks. A U.S. insurance company agreed to post this bond, provided that Worldcash posted

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[1] As the petitioners explained in their petition for a rehearing in the court of appeals, that court's decision contains a number of factual mistakes. None of those errors is relevant, in and of itself, to the questions of law presented to this Court. To the extent, however, that the decision below implies that CCE does or transacts business in England, it is materially wrong. CCE's principal and only places of business are in New York, and nothing in the record even suggests otherwise.

collateral to secure the insurance company's potential liability under that bond. To this end, a New York office of respondent Barclays Bank PLC ("Barclays") issued an irrevocable $500,000 letter of credit to the insurance company. This New York letter of credit was just one of a wide variety of complex, highly customized banking services that Barclays provided to petitioners and their affiliates over an eighteen-year period.

In May 1995, Barclays informed one of the petitioners' foreign affiliates that it was unwilling to act any longer as the Chequepoint Group's bankers, and requested that Chequepoint make alternative banking arrangements forthwith. Barclays specifically demanded that the New York letter of credit, which was essential to Worldcash's New York State money transmission license, be included in the alternative banking arrangements.

Respondent National Westminster Bank PLC ("Nat West") was the only other entity that could provide the full range of banking services that Barclays had been providing. In July 1995, NatWest offered to enter into a relationship with Chequepoint; but three weeks later, after NatWest consulted with Barclays and they agreed not to provide banking services to Chequepoint, NatWest abruptly terminated its discussions with Chequepoint, and advised that it would not provide Chequepoint with any banking services "in view of the increasing size of the Group's activities in a sector in which we are both competing."

True to its May 1995 threat, but only after securing NatWest's agreement that it would not replace Barclays as Chequepoint's principal bankers, Barclays terminated all the banking services that it had provided to the petitioners and their affiliates.[2] The last step in this process came in

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[2] Barclays and NatWest argued below, of course, that their decision not to do business with Chequepoint was motivated by legitimate business considerations. If given an opportunity, the petitioners will prove that the purpose and effect of the banks' agreement was to restrain competition.

January 1996, when Barclays notified the U.S. insurance company that had posted a bond for Worldcash that Barclays would not renew its New York letter of credit, and that the letter of credit would therefore expire on March 19, 1996.[3]

B. The Proceedings Below

The respondents moved to dismiss the complaint on the grounds of *forum non conveniens* and failure to state a claim. The three individual respondents (senior officers of Barclays and NatWest, who were personally involved in their agreement not to do business with the petitioners) also moved to dismiss on the ground of lack of personal jurisdiction. Among other papers, the parties submitted declarations by English counsel concerning the possibility of the petitioners' pursuing their claims in an English court: the respondents submitted two declarations by Richard Fowler, Q.C.; and the petitioners submitted a declaration by Alan Rupert Tyrrell, Q.C.

The district court dismissed the complaint on the ground of *forum non conveniens.* It held that *National City Lines I* is not applicable because the complaint does not cite § 12 of the Clayton Act as a basis of venue. (19a)[4] In reaching this conclusion, the district court ignored the rule that "it is not necessary for plaintiff to include allegations showing the venue to be proper." Fed. R. Civ. P. Form 2, Note 3. *Accord, e.g., Ripperger v. A.C. Allyn & Co.,* 113 F.2d 332, 334 (2d Cir. 1940); 17 *Moore's Federal Practice 3d* § 110.01[5][c] (1998).

The district court found that "England is an adequate forum for plaintiffs' claims because defendants are amenable to process there and plaintiffs may litigate the dispute

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[3] To maintain the security for its bond, the insurance company drew a sight draft against the letter of credit, and is now holding the $500,000 as collateral.

[4] The district court erroneously referred to § 12 of the Sherman Act, rather than the Clayton Act.

there. . . . Their antitrust claims . . . can be asserted under Articles 85 and 86 of the Treaty of Rome, which are incorporated in English domestic law." (19a) In response to the petitioners' argument that they could not state a claim under Articles 85 and 86 because they do not, and cannot, claim any effect upon trade between or among Member States of the European Community, the district court ruled "that potential lack of success on the merits does not show that English courts do not provide for adequate litigation of the subject matter of the dispute." (19a-20a)

The district court went on to hold that there were no "public interests strongly favoring or discouraging dismissal, but that "the private interests of the litigants strongly favor an English forum." (20a) On this basis, the district court dismissed the complaint on the ground of *forum non conveniens,* without addressing any of the respondents' other arguments.

The court of appeals affirmed the dismissal on the ground of *forum non conveniens,* but did not accept the reasoning of the district court. First, the court of appeals did not rely upon the absence of § 12 from the complaint; it accepted that § 12 is the basis for venue in this action. The court of appeals therefore addressed the substance of *National City Lines I,* but described that decision as holding only "that *forum non conveniens* could not be used to transfer an antitrust suit to a more convenient forum within the United States." (5a) In fact, this Court held in *National City Lines I* that courts do not have the power to dismiss an antitrust action on the ground of *forum non conveniens.*

The court of appeals then noted that shortly after *National City Lines I* was decided, Congress enacted 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The court of appeals acknowledged that "Section 1404(a) does not apply in cases where the purportedly more convenient forum is not a United States district court. In such cases, almost always involving foreign countries, the common law doctrine of *forum non conveniens* governs." (6a) The court of appeals went on to discuss, however, this Court's decision in *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949) ("*National City Lines II*"), that § 1404(a) is applicable in antitrust actions; and the court of appeals somehow deduced that "although its reasoning relied upon § 1404(a), *National City* [*Lines*] *II* left open the possibility that an antitrust case could be dismissed under the forum non conveniens doctrine, even if § 1404(a) did not apply." (7a) The court of appeals went on to cite an earlier Second Circuit decision holding that *forum non conveniens* is applicable in RICO actions, *Transunion Corp. v. Pepiso, Inc.*, 811 F.2d 127 (2d Cir. 1987), and came to the astounding conclusion that "in this Circuit, *National City Lines I* is no longer good law, even in cases that are not governed by § 1404(a)." (8a) In other words, although this Court in *National City Lines II* very carefully and plainly did not overrule *National City Lines I* as to the non-applicability of the common law rule of *forum non conveniens* in antitrust actions, the court of appeals below nonetheless held that *forum non conveniens* is applicable in antitrust actions because § 1404(a) is.

The court of appeals also cited *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944 (1st Cir. 1991), although it is not clear whether the Second Circuit embraced the reasoning of that decision. In *Howe*, the First Circuit (in an opinion by then-Chief Judge Breyer) held that *forum non conveniens* is applicable in RICO actions. It also observed, in *dicta*, that "[b]ecause *National City Lines I* did not consider international transfers, . . . the holding of *National City Lines I* did not preclude the use of *forum non conveniens* in the international context." (9a)

The Second Circuit below "concede[d] that the Fifth Circuit has essentially accepted the argument advanced by CCE and Worldcash. *See Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989); *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982)." (9a) But the court of appeals was "not persuaded by the Fifth Circuit's reasoning", and concluded "that antitrust suits are subject to dismissal under the *forum non conveniens* doctrine." (10a)

The court of appeals then further erred by affirming the district court's finding that England is an adequate alternative forum for the petitioners' Sherman Act claims. The court of appeals acknowledged that "English courts will not enforce the Sherman Act." (12a) But it held that "Plaintiffs may challenge defendants' allegedly anti-competitive actions under Articles 85 and 86 of the Treaty of Rome, which English courts are bound to enforce. These provisions are roughly analogous to Sections 1 and 2 of the Sherman Act, and create a private cause of action to challenge anti-competitive, monopolistic actions." (*Id.*) The court of appeals did not even address the dispositive fact that because the petitioners do not, and cannot, plead any effects upon trade between Member States of the European Community, no English court would have subject matter jurisdiction under Article 85 or 86 of the Treaty of Rome.[5]

Finally, the court of appeals affirmed the district court's conclusion "that the private and public interests involved in this case tilt in favor of trying the action in England." (14a) Although the petitioners believe the court of appeals erred in reaching this conclusion, too, we do not ask this Court to review this aspect of the court of appeals' decision.

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[5] The court of appeals' failure to address this point was a principal basis for the petitioners' petition for rehearing in the court of appeals. The court of appeals denied the petition without comment.

REASONS FOR GRANTING THE PETITION

As the Second Circuit acknowledged, its decision that the doctrine of *forum non conveniens* is applicable in antitrust actions both declares this Court's decision in *National City Lines I* null and void, and conflicts with two decisions of the Fifth Circuit. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, (5th Cir. 1989); and *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982). It also conflicts with a decision of the United States District Court for the District of Columbia. *Lakers Airways v. Pan American World Airways*, 568 F. Supp. 811, 818 (1983) ("the Court fully agrees with *Mitsui*").

The court of appeals' decision also runs contrary to this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), where the Court held that an agreement to arbitrate all claims would be void if the U.S. party had a Sherman Act claim, but the arbitral tribunal would not take cognizance of that claim. An English court will not take cognizance of petitioners' Sherman Act claims, and therefore they cannot be compelled to litigate there.

The court of appeals' decision also runs contrary to the rule of this Court that an action may be dismissed on the ground of *forum non conveniens* only upon a showing that "there exists an alternative forum" where the plaintiff's claims can be heard. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) ("Piper Aircraft"). Here, because an English court will not hear a claim under the Sherman Act, and will not have subject matter jurisdiction over the petitioners' claims under the Treaty of Rome, there is no alternative forum.

Moreover, the question of whether *forum non conveniens* is applicable to antitrust actions is of great, and growing, importance. More and more antitrust cases involve foreign conspiracies affecting U.S. companies. If

National City Lines I is reversed, and these foreign conspirators are able to avoid accountability in U.S. courts, their U.S. victims will be left without recourse. Indeed, by finding that an English court is an adequate alternative forum for the petitioners' claims here, notwithstanding that the English court will not apply the Sherman Act, and will not have subject matter jurisdiction under the purportedly analogous provisions of the Treaty of Rome, the court below has created a path that could emasculate private enforcement of the U.S. antitrust laws vis-à-vis foreign conspiracies.

Thus, the decision below is erroneous; is in conflict with decisions of this Court, of another United States court of appeals, and of a United States district court; and addresses an extremely important federal question.

I. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

Over 50 years ago, this Court held in *National City Lines I* "that the courts were given no . . . power to dismiss an antitrust action on the ground of *forum non conveniens.*" 334 U.S. at 597. This Court reached this conclusion after a careful, exhaustive study of the legislative history of the venue provision of the antitrust laws, § 12 of the Clayton Act: "In the face of this history, we cannot say that room was left for judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice given by the section. That result . . . would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice." 334 U.S. at 588.

Not surprisingly, in light of the clear and unequivocal ruling by this Court in *National City Lines I,* from then until this case there was not a single reported instance of an antitrust action being dismissed on the ground of *forum non conveniens.* To the contrary, in every reported antitrust case before this one where a defendant

moved to dismiss on the ground of *forum non conveniens*, the court denied the motion on the ground that *forum non conveniens* is not applicable in antitrust actions. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989); *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982); *Laker Airways v. Pan American World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983).

Commentators, too, agree that *forum non conveniens* is not applicable in antitrust actions. *E.g.*, 17 *Moore's Federal Practice 3d* § 111.76 at 111-238 n.1 (1998) ("Forum non conveniens [is] inapplicable to antitrust cases."); 24 *Fed. Proc. L. Ed.* § 54:155 (1984) ("The common law doctrine of forum non conveniens is inapplicable to suits brought under the federal antitrust laws.").

Rejecting all this authority, the court below purports to find in *National City Lines II* a decision to overrule *National City Lines I*. This is plainly erroneous. *National City Lines II* held only that § 1404(a), which was enacted after this Court decided *National City Lines I*, "is applicable" to antitrust actions. 337 U.S. at 84. Section 1404(a), however, is not applicable here: it only provides for transfers from one district to another, not for dismissal in favor of a foreign jurisdiction. "§ 1404(a) transfers are different than dismissals on the ground of forum non conveniens." *Piper Aircraft, supra*, 454 U.S. at 253. "District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of forum non conveniens." *Id.* Indeed, the "reasoning employed" in a case applying § 1404(a) "is simply inapplicable to dismissals on grounds of forum non conveniens." *Id.*

Where, as here, a defendant seeks dismissal of an action in favor of a purportedly more convenient foreign forum, the only source of authority for a district court to grant the motion is the common law doctrine of *forum non conveniens*; and in *National City Lines I*,

this Court squarely held that *forum non conveniens* is not applicable in antitrust actions. The holding in *National City Lines II* that § 1404(a) is applicable in antitrust actions is simply irrelevant here. In *National City Lines II*, the Court began by summarizing *National City Lines I* as "holding that forum non conveniens was not available in antitrust suits", 337 U.S. at 79-80; and by the end of the *National City Lines II* decision, that holding remained intact, with the addition that § 1404(a) "is applicable." *Id.* at 83.

In short, § 1404(a) is applicable in antitrust actions, but *forum non conveniens* is not. Where appropriate, an antitrust action may be transferred from one district to another pursuant to § 1404(a), but under no circumstances may an antitrust action be dismissed on the ground of *forum non conveniens.*

The court of appeals also cited *dicta* from a First Circuit decision to the effect that because *National City Lines I* concerned a "domestic transfer", it is not applicable to "international transfers." (9a, citing *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944 (1st Cir. 1991).) There is no such thing, however, as an "international transfer." Unlike when a § 1404(a) motion is granted, this case has not been transferred to an English court; it has been dismissed.

Moreover, if, as this Court held in *National City Lines I*, a district court does not have the power to dismiss an antitrust action on the ground of *forum non conveniens* where another district court is a more convenient forum, it seems inconceivable that the district court would have such authority upon concluding that a foreign forum would be more convenient. The Court's decision in *National City Lines I* was not in any way based upon the location of the more convenient forum. Rather, this Court carefully and exhaustively reviewed the legislative history of § 12 of the Clayton Act, and concluded that:

> the section's intent and effect are altogether inconsistent with any idea that the defendant corporation can defeat the plaintiff's choice of venue as given, by asking for and securing dismissal of the suit, either on the ground that the venue selected within the statutory limits is inconvenient for the defendant or that another authorized venue is more convenient for it.

334 U.S. at 580. The Court went on to hold "that the courts were given no . . . power to dismiss an antitrust action on the ground of *forum non conveniens*", 334 U.S. at 597; and § 1404(a) does not confer any such power of dismissal.

Thus, *National City Lines I, National City Lines II* and § 1404(a) taken together simply do not permit dismissal of an antitrust action on the ground of *forum non conveniens,* whether the more convenient forum is domestic or foreign.

Moreover, even if the doctrine of *forum non conveniens* were applicable in antitrust actions, the court of appeals' dismissal of this case on the ground that litigation in an English court would be more convenient would be erroneous for two reasons.

First, as the court of appeals correctly observed, an English court "will not enforce the Sherman Act." (12a) In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), this Court enforced an agreement to resolve antitrust claims by arbitration. The Court noted concern, however, that the arbitral tribunal might fail to take cognizance of the U.S. party's Sherman Act cause of action, and held that if this occurred, "we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19. Thus, a U.S. party's voluntary agreement to arbitrate a dispute involving a Sherman Act claim before a tribunal that would not apply the Sherman Act would be void as a matter of law. Surely then, a district court cannot compel a U.S. party

to litigate a dispute involving a Sherman Act claim before a tribunal, such as an English court, that will not apply the Sherman Act![6]

Second, the court below erred in holding that the petitioners, "under Articles 85 and 86 [of the Treaty of Rome], . . . may litigate the subject matter of their Sherman Act claims in England." (12a) This is wrong as a matter of law: Articles 85 and 86 apply only where anticompetitive conduct "affects trade between Member States" of the European Community.[7] The petitioners here do not engage in any such trade, and they do not, and cannot, complain of any effects upon such trade. They participate in trade between England and the U.S., and within the U.S., and they complain about the effects of the defendants' anticompetitive conduct upon that trade. Therefore, an English court would not have subject matter jurisdiction over the plaintiffs' claims under Article 85 or 86.

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[6] A leading commentary argues strongly that in general, not just in actions under the Sherman Act, "because the consequence of granting the forum non conveniens motion is dismissal, when American law applies, the courts should not dismiss and defer to a foreign jurisdiction, but rather should retain jurisdiction." 17 *Moore's Federal Practice 3d* § 111.77 at 111-242 (1998). Of course, this Court need not go this far to hold that cases brought under the Sherman Act cannot be dismissed on the ground of *forum non conveniens*.

[7] The parties' experts on English law agree upon this point: "Both Articles 85 and 86 have a jurisdictional clause, to the effect that the agreement or concerted practice (Article 85) or the abuse of a dominant position (Article 86) is capable of having an appreciable effect on trade between Member States. This is much narrower than the Sherman Act which extends the effect to trade with foreign nations." Declaration of Alan Rupert Tyrrell, Q.C., at 4 ¶ 7.5 [submitted by the petitioners]; "It is certainly the case that, for Article 85 or 86 to apply, there are jurisdictional requirements of actual or potential effects upon trade between Member States of the EU." Second Fowler Declaration at 2 ¶ 2 [submitted by the respondents].

Thus, the purportedly adequate alternative forum—an English court—is not an alternative forum at all; and the petitioners have been left without any forum in which to pursue their Sherman Act claims against the respondents. Where there is no alternative forum, an action may not be dismissed on the ground of *forum non conveniens*. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS

As we have just shown, the decision below conflicts with decisions of this Court. Moreover, the Second Circuit itself "concede[d]" that its decision that *forum non conveniens* is applicable in antitrust actions stands in direct conflict with two decisions of the Fifth Circuit, which hold that the rule of *National City Lines I* is still good law: *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989); and *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982). (9a) The lower court's decision also stands in direct conflict with the decision following the Fifth Circuit in *Laker Airways v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C. 1983). Only this Court can resolve this conflict.

III. THE QUESTION OF WHETHER *FORUM NON CONVENIENS* IS APPLICABLE IN ANTITRUST ACTIONS IS EXTREMELY IMPORTANT

It is widely recognized that conspiracies in restraint of trade with international effects, like the conspiracy underlying this case, are a large, and growing, problem. From 1992 to 1998, "the portion of the Antitrust Division's cases having an international dimension . . . increased from less than 5% to more than 30%." Joel I. Klein, Assistant Attorney General, Antitrust Division, *The Importance of Antitrust Enforcement in the New Economy*, Address Before the New York State Bar Association Anti-

trust Law Section Program 2 (January 29, 1998). As of October 1998, about one-third of the Antitrust Division's criminal investigations concerned "suspected international cartel activity." A. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, *Antitrust Enforcement in a Global Economy,* Address Before Fordham Corporate Law Institute 2-3 (October 22, 1998). Indeed, there is an international consensus that "the growing integration of the world economy has the consequence that anticompetitive practices have increasingly a transborder dimension." *1997 World Trade Organization Annual Report,* Chapter 7 at 30.

Under these circumstances, it is critically important for this Court to eliminate any uncertainty as to whether U.S. antitrust cases can be dismissed on the ground of *forum non conveniens.* In light of the decision below, it can be expected that in any civil action challenging transborder anticompetitive agreements or conduct, the defendants will seek dismissal on the ground of *forum non conveniens* in favor of a foreign jurisdiction (particularly one, such as England, where the Sherman Act will not be enforced). This Court should therefore act promptly, in this case, to reestablish the rule of *National City Lines I* that antitrust actions cannot be dismissed on the ground of *forum non conveniens.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 1999

APPENDICES

APPENDIX A

[Filed Sep. 16, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 1, 1998 Decided: Sep. 16, 1998)

Docket No. 97-9228

CAPITAL CURRENCY EXCHANGE, N.V.,
doing business as Chequepoint USA
and Chequepoint Worldcash, Inc.,
Plaintiffs-Appellants,

-v.-

NATIONAL WESTMINSTER BANK PLC,
BARLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Defendants-Appellees.

Before: McLAUGHLIN and PARKER, *Circuit Judges*, and EGINTON, *District Judge*.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Stanton, *Judge*), dismissing appellants' complaint under the doctrine of *forum non conveniens*.

AFFIRMED.

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* The Honorable Warren W. Eginton of the United States District Court for the District of Connecticut, sitting by designation.

McLAUGHLIN, *Circuit Judge*:

BACKGROUND

Capital Currency Exchange, N.V. ("CCE"), is a financial company organized under the laws of the Netherlands Antilles. CCE has a number of affiliates, including Chequepoint Worldcash, Inc. ("Worldcash"), a New York corporation, and Chequepoint (UK) Ltd. ("Chequepoint UK"), a British Virgin Islands company that transacts business in Great Britain.

CCE and its affiliates are engaged principally in two kinds of international financial transactions: (1) retail currency exchange, e.g., changing pounds to dollars for tourists; and (2) money transfers, e.g., wiring money from the United States to England.

Barclays Bank PLC ("Barclays UK") and National Westminster Bank PLC ("NatWest UK") are English corporations. As full-service banks, Barclays UK and NatWest UK offer currency exchange and money transfer services to their customers.

CCE and its affiliates had a longstanding banking relationship with Barclays UK. In 1991, CCE, on behalf of Worldcash, sought a New York State money transmission license. To qualify for this license, Worldcash had to post a $500,000 bond in favor of the New York State banking authorities. CCE arranged with Barclays UK's New York office to issue an irrevocable letter of credit as security for the bond. This letter of credit was payable in New York and expressly was governed by New York law. The letter of credit, however, named Barclays UK's London office as the issuer.

In May 1995, for reasons that the parties hotly dispute, Barclays UK told CCE to find another banker. Barclays UK claims that it discovered Chequepoint UK's complicity in a check kiting scheme, and decided to end its relationship with CCE and its affiliates. CCE counters that Bar-

clays UK wanted to use a trademark that was similar to one owned by CCE, and when CCE objected, Barclays UK set out to end their relationship.

Whatever the reason, CCE began negotiating with NatWest UK in July 1995 to establish a new banking relationship. In August 1995, NatWest UK declined to provide CCE with banking services. The reasons for NatWest UK's refusal are disputed. At the time, NatWest UK attributed its refusal to the fact that: (1) NatWest UK and Chequepoint UK were competitors in the money transfer business; and (2) Chequepoint UK had misrepresented facts about NatWest UK's money transfer services to consumers. NatWest UK now claims that its refusal was based on information that led it to believe that CCE and Chequepoint UK were involved in money laundering. CCE maintains that NatWest UK and Barclays UK conspired to drive CCE out of the money transfer business by depriving it of banking services.

On August 23, 1996, CCE and Worldcash, but not Chequepoint UK, brought suit in the United States District Court for the Southern District of New York (Stanton, J.). The suit named as defendants: (1) NatWest UK; (2) Hamish Gray, the CEO of NatWest UK; (3) Lord Alexander of Weedon, the Chairman of NatWest UK's Board of Directors; (4) Barclays UK; and (5) John Martin Taylor, the CEO of Barclays UK. The complaint alleged that NatWest UK, Barclays UK, and the individual defendants violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, by denying banking services to CCE and its affiliates. The complaint also alleged four common law causes of action against Barclays UK and Taylor arising out of the termination of the CCE-Barclays UK banking relationship.

On November 6, 1996, defendants moved to dismiss the complaint: (1) for failure to state a claim; and (2) under the *forum non conveniens* doctrine. On August 28, 1997, Judge Stanton granted defendants' motion solely on

forum non conveniens grounds. Judge Stanton found that: (1) antitrust suits are subject to the *forum non conveniens* doctrine; (2) England is an adequate forum for plaintiffs' suit; and (3) the public and private interests involved in this suit favor litigation in England.

CCE and Worldcash now appeal, arguing that all three of Judge Stanton's conclusions were erroneous.

DISCUSSION

I. *Application of Forum Non Conveniens to Antitrust Suits*

CCE and Worldcash posit that an antitrust suit cannot be dismissed under the *forum non conveniens* doctrine. We disagree.

Judge Stanton's conclusion that an antitrust suit can be dismissed under the *forum non conveniens* doctrine is a conclusion of law that we review *de novo*. *See Murray v. British Broad. Corp.*, 81 F.3d 287, 292 (2d Cir. 1996).

The common law has long permitted dismissal of suits where jurisdiction and venue are proper, but another forum is substantially more convenient. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n. 13 (1981); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929). Despite the doctrine's long history, the Supreme Court did not explicitly recognize the applicability of *forum non conveniens* in federal question cases until 1947. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Even after *Gilbert*, however, the doctrine did not apply in cases brought under certain federal statutes. *See, e.g., Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941) (Federal Employers Liabiltiy Act suits not subject to dismissal in favor of more convenient forum), *overruled by Ex parte Collett*, 337 U.S. 55 (1949).

In *United States v. National City Lines Inc.*, 334 U.S. 573, 596 (1948) ("*National City I*"), the Supreme Court

held that *forum non conveniens* could not be used to transfer an antitrust suit to a more convenient forum within the United States. In *National City I*, the government sued a number of corporations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, alleging that the defendants conspired to monopolize public transportation in a number of cities. The government brought the suit in Los Angeles, in what was then the Southern District of California.

Defendants moved to dismiss on the ground that the Northern District of Illinois was a more convenient forum. The district court granted defendants' motion and dismissed the complaint without prejudice to re-filing in the Northern District of Illinois. *See United States v. National City Lines Inc.*, 7 F.R.D. 456, 466 (S.D. Cal. 1947).

On direct appeal pursuant to 15 U.S.C. § 29, the Supreme Court reversed, holding that *forum non conveniens* could not be used to dismiss a suit brought under the Sherman Act. *See National City I*, 334 U.S. at 578. The Court's conclusion was based on the "special venue" provision in Section 12 of the Clayton Act, which liberalized the venue provisions of the Sherman Act. *See* 15 U.S.C. § 22 (Clayton Act); 15 U.S.C. §§ 5, 7 (Sherman Act). Section 12 of the Clayton Act permits a Sherman Act claim to be brought "in any district wherein [a defendant corporation] may be found or transacts business." 15 U.S.C. § 22; *see Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 372-73 (1927).

The *National City I* Court reasoned that: (1) Section 12 of the Clayton Act demonstrated a congressional intent to expand the possible fora available to antitrust plaintiffs; and (2) application of *forum non conveniens* in Sherman Act cases would be inconsistent with that intent. "To have broadened the choice of venue for the reasons that brought about that action [namely, to prevent wealthy corporate defendants from transferring suits to

distant and expensive venues], only to have it narrowed again by application of the vague and discretionary power comprehended by *forum non conveniens* would have been incongruous, to say the least." *National City I*, 334 U.S. at 581.

In September 1948, shortly after *National City I* was decided, Congress enacted 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Section 1404(a) thus supplanted the common law doctrine of *forum non conveniens* for transfers between United States district courts. *See Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 501 n.3 (2d Cir. 1966). Section 1404(a) does not apply in cases where the purportedly more convenient forum is not a United States district court. In such cases, almost always involving foreign countries, the common law doctrine of *forum non conveniens* still governs. *See Piper*, 454 U.S. at 253; *Fitzgerald*, 369 F.2d at 501 n.3. Section 1404(a) cases are *transferred* to a more convenient federal forum; *forum non conveniens* cases are *dismissed* in anticipation of a re-filing in a more convenient foreign forum. *See* 15 Charles A. Wright et al., *Federal Practice and Procedure* § 3828, at 278-79 (1986).

After § 1404(a) was enacted, the *National City I* defendants again moved to transfer the case to the Northern District of Illinois, this time relying on the new statute. The district court granted the motion. *See United States v. National City Lines Inc.*, 80 F. Supp. 734, 744 (S.D. Cal. 1948). The government moved for leave to file a petition for *certiorari*, but the Supreme Court denied the motion, holding that § 1404(a) had overruled *National City I*, and the district court therefore was free to transfer the case. *See United States v. National City Lines Inc.*, 337 U.S. 78, 84 (1949) ("*National City II*").

The *National City II* Court explained that § 1404(a) authorized the transfer of "*any* civil action" between fed-

eral district courts, *including antitrust cases. See id.* at 80 (quoting 28 U.S.C. § 1404(a)). Although its decision was based upon § 1404(a), the Court did not explicitly limit its holding to cases governed by § 1404(a). Indeed, the *National City II* Court did not distinguish § 1404(a) from the common law doctrine of *forum non conveniens*, noting that the issue before it was whether § 1404(a) "extends the doctrine of forum non conveniens to antitrust suits." *See id.* at 79; *see also id.* at 80 (noting that Federal Employers Liability Act cases were "now subject to the doctrine of forum non conveniens" as a result of § 1404(a) (citing *Ex Parte Collett*, 337 U.S. at 55, and *Kilpatrick v. Texas & Pac. R.R. Co.*, 337 U.S. 45 (1949)). Thus, although its reasoning relied on § 1404 (a), *National City II* left open the possibility that an antitrust case could be dismissed under the forum non conveniens doctrine, even if § 1404(a) did not apply.

CCE and Worldcash seek to draw a distinction that *National City II* failed to make between cases governed by § 1404(a) and those governed by the common law doctrine of *forum non conveniens.* They argue that because *National City II* was based upon § 1404(a), it overruled *National City I* only with regard to cases governed by § 1404(a). They then conclude that because § 1404(a) does not apply in this case, *forum non conveniens* dismissal is precluded by the holding of *National City I.* We do not agree.

As an initial matter, plaintiffs ignore *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (per curiam), where we explained that the holding in *National City I* is no longer valid, *even in cases that are not governed by § 1404(a).* In *Transunion*, defendants sought dismissal of a RICO claim on the ground that the Philippines was a more convenient forum. We affirmed Judge Weinfeld's grant of dismissal, holding that *forum non conveniens* can apply to RICO claims, despite the fact that the RICO statute has a "special venue" provision modeled on Section 12 of the Clayton Act. *See id.*

In *Transunion*, we specifically rejected the argument that *National City I* foreclosed the availability of *forum non conveniens* when a statute has a "special venue" provision like Section 12 of the Clayton Act. Even though *Transunion* was not governed by § 1404(a), we concluded that "the result in *National City* [*I*] *was* effectively overruled by Congress in 1948 when it enacted 28 U.S.C. § 1404(a)," and affirmed dismissal. *Id.* Thus, in this Circuit, *National City I* is no longer good law, even in cases that are not governed by § 1404(a). *See id.*; *see also Cruz v. Maritime Co.*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) (*forum non conveniens* applicable in cases governed by Jones Act despite special venue provision).

The plaintiffs characterize our conclusion in *Transunion* regarding *National City I* as mere *dictum*, and maintain that it therefore is not binding upon this panel. We disagree.

Plaintiffs in *Transunion* argued that *National City I*'s bar on *forum non conveniens* dismissals applied to RICO claims because the RICO statute's venue provision was "modeled on present antitrust legislation," H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970); see *Transunion*, 811 F.2d at 130. We rejected this argument on the ground that antitrust legislation in 1970 did not incorporate the holding of *National City I* because "the result in National City Lines [I] was effectively overruled by Congress in 1948 when it enacted [§ 1404(a)]." *Id.* This statement was hardly *dictum*. It was necessary to our conclusion that *National City I*'s holding did not apply in RICO cases. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound."); *see also Commodity Futures Trading Comm'n v. Dunn*, 58 F.3d 50, 53-54 (2d Cir. 1995), *rev'd on other grounds*, 519 U.S. 465 (1997).

The First Circuit reached the same conclusion on the validity of *National City I*, although it employed somewhat different reasoning. In *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 949 (1st Cir. 1991), then-Chief Judge Breyer explained that *National City I* did not preclude *forum non conveniens* dismissal of a case not governed by § 1404(a), even when the cause of action is based upon a statute with a "special venue" provision modeled on Section 12 of the Clayton Act. Justice Breyer specifically rejected the argument that the holding in *National City I* continues to govern *forum non conveniens* dismissals. His analysis was based upon the facts of *National City I* and a strict construction of the holding in that case.

As discussed above, *National City I* involved a transfer between two United States district courts. Justice Breyer pointed out that "the Court in *National City Lines I* considered only domestic transfers; it did not consider international transfers at all." *See id.* Because *National City I* did not consider international transfers, Justice Breyer reasoned, the holding could not have applied to such cases. Justice Breyer therefore concluded that the holding of *National City I* did not preclude the use of *forum non conveniens* in the international context, and the question whether *National City II* overruled *National City I* was irrelevant. *See id.*

We concede that the Fifth Circuit has essentially accepted the argument advanced by CCE and Worldcash. *See Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989); *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982). In *Mitsui*, the court found that *National City II* overruled *National City I* only with regard to transfers between United States district courts. This conclusion was based upon the fact that *National City II* specifically relied on § 1404(a) in finding that *National City I* was invalid. *See Mitsui*, 671 F.2d at 890.

For the reasons discussed above, we are not persuaded by the Fifth Circuit's reasoning. In the first place, as Justice Breyer explained, *National City I*'s holding was limited to domestic transfers. *See Howe*, 946 F.2d at 949. Moreover, *National City II* and its companion cases did not draw a bright-line distinction between transfers under § 1404(a) and the doctrine of *forum non conveniens*. *See National City II*, 337 U.S. at 79, 80; *see also Ex Parte Collett*, 337 U.S. at 56. Finally, *Mitsui* directly conflicts with our conclusion in *Transunion*, which we are bound to follow. We conclude, therefore, that antitrust suits are subject to dismissal under the *forum non conveniens* doctrine.

II. *Application of Forum Non Conveniens to this Suit*

A. *Governing Law*

Plaintiffs argue that, even if an antitrust case can be dismissed on *forum non conveniens* grounds, Judge Stanton erred by concluding that the doctrine supported dismissal in this case. We disagree.

Our review of a *forum non conveniens* dismissal is extremely limited. *See Piper*, 454 U.S. at 257. "[T]he decision lies wholly within the broad discretion of the district court and should be reversed only if that discretion has been clearly abused." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996) (internal quotation marks and citation omitted); *see also Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998) (limited but "meaningful" review).

Any *forum non conveniens* analysis involves two steps. First, a court must determine that an adequate alternative forum exists. *See Piper*, 454 U.S. at 254; *Peregrine Myanmar*, 89 F.3d at 46. An alternative forum is adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits "litigation of the subject matter of the dispute." *Piper*, 454 U.S. at 254 n.22. As we have earlier observed, the fact that the law

of the foreign forum differs from American law "should ordinarily not be given conclusive or even substantial weight," in assessing the adequacy of the forum. *Id.* at 247.

If a court concludes that an adequate alternative forum exists, it then must weigh the public and private interests identified in *Gilbert* to determine which forum "will be the most convenient and will best serve the ends of justice." *Peregrine Myanmar*, 89 F.3d at 46. If a district court considers all the *Gilbert* factors before dismissing a case on *forum non conveniens* grounds, we accord its decision "substantial deference." *See Piper*, 454 U.S. at 241.

The public interests to be considered include: (1) having local disputes settled locally; (2) avoiding problems of applying foreign law; and (3) avoiding burdening jurors with cases that have no impact on their community. The private interests embrace: (1) ease of access to evidence; (2) the cost for witnesses to attend trial; (3) the availability of compulsory process; and (4) other factors that might shorten trial or make it less expensive. *See Piper*, 454 U.S. at 241; *Gilbert*, 330 U.S. at 508.

In assessing convenience, there generally is a strong presumption in favor of a plaintiff's chosen forum. *See Piper*, 454 U.S. at 255. Thus, dismissal usually is not appropriate unless "the balance of convenience tilts strongly in favor of trial in the foreign forum." *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991). However, this presumption is weaker "when the plaintiff or real parties in interest are foreign." *Piper*, 454 U.S. at 255; *see R. Maganlal*, 942 F.2d at 168.

B. *Adequate, Alternative Forum*

Judge Stanton concluded that England is an adequate forum for plaintiffs' claims. Plaintiffs argue that England is inadequate because: (1) it does not recognize claims under the Sherman Act; (2) it is unclear whether an English court will award damages, and/or treble damages,

in an antitrust suit; and (3) it might not recognize some of plaintiffs' common law causes of action.

1. *Sherman Act Claims*

English courts will not enforce the Sherman Act. *See British Nylon Spinners Ltd. v. Imperial Chem. Indus., Inc.*, [1953] 1 Ch. 19 (Court of Appeal 1952). However, *forum non conveniens* dismissal is not trumped simply because the foreign forum will apply different substantive law than an American court. *See Piper*, 454 U.S. at 249; *Transunion*, 811 F.2d at 129. "The availability of an adequate alternate forum does not depend on the existence of an identical cause of action in the other forum." *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998).

Plaintiffs may challenge defendants' allegedly anti-competitive actions under Articles 85 and 86 of the Treaty of Rome, which English courts are bound to enforce. *See* Case 127/73, *BRT v. SABAM*, [1974] ECR 51. These provisions are roughly analogous to Sections 1 and 2 of the Sherman Act, and create a private right of action to challenge anti-competitive, monopolistic actions. *See Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1984] 1 AC 130. Given the availabiilty of a cause of action under Articles 85 and 86, we are satisfied that plaintiffs may litigate the subject matter of their Sherman Act claims in England. *See PT United Can*, 138 F.2d at 74 (dismissal proper although RICO claims could not be brought in alternate forum; fraud claim adequate substitute); *Transunion*, 811 F.2d at 129-30 (same); *see also Howe*, 946 F.2d at 952 (dismissal proper although U.S. securities law claims could not be brought in alternate forum).

2. *Availability of Money Damages*

Plaintiffs also argue that England is inadequate because it is unclear whether an English court will award money damages for a violation of Articles 85 and 86 of the

Treaty of Rome. In support of their argument, plaintiffs presented a declaration by Alan Rupert Tyrrell, Q.C., an expert on English law. Tyrrell pointed out that no English court has ever awarded money damages in a suit brought under Articles 85 and 86, and plaintiffs argue that the lack of a certain monetary remedy makes England an inadequate forum.

However, Tyrrell also admitted that "[i]n principle the usual remedies of English law, in particular damages, can as a matter of law be awarded in civil actions in an English Court against a [d]efendant who has infringed Article 85 or 86." Moreover, Tyrrell conceded that it is a position "widely held by jurists . . . that infringements of Articles 85 and 86 [of the Treaty of Rome] give rise to an action for damages." Indeed, in deciding an interlocutory appeal, the Law Lords of the House of Lords concluded (by a vote of four to one) that damages are available for a violation of Article 86. *See Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1984] 1 AC 130. Although a final judgment was never entered in the case, and the decision is therefore considered *dicta*, we find the *Garden Cottage Foods* case highly persuasive on the question of whether monetary damages would be available to plaintiffs in England. Thus, although English courts have not *yet* awarded damages in an antitrust case, it appears that English courts have the power to do so. *See also An Bord Bainne v. Milk Mktg. Bd.*, [1984] 1 CMLR 519.

Plaintiffs also argue that England is inadequate because, even assuming that monetary damages are available, English courts will not award treble damages under the Sherman Act. It is well-established, however, that the unavailability of treble damages does not render a forum inadequate. *See Piper*, 454 U.S. at 247 (possibility of lower recovery no bar to *forum non conveniens*); *Transunion*, 811 F.2d at 129 (unavailabilty of RICO treble damages does not render forum inadequate).

3. *Common Law Claims*

Finally, plaintiffs argue that a number of their common law claims against Barclays UK and Taylor cannot be redressed in the English courts. Specifically, plaintiffs assert that: (1) England does not recognize third-party beneficiary liability for breach of contract; (2) England does not imply a covenant of good faith in every contract; (2) England does not imply a covenant of good faith in every contract; and (3) England does not, as a matter of law, impose a fiduciary duty on banks regarding their customers. In essence, plaintiffs argue that it will be harder for them to recover on their common law claims in England. They concede, however, that England recognizes a number of relevant common law causes of action, including breach of contract, tortious interference, and, in certain circumstances, breach of fiduciary duty by a bank. We believe that the English courts can adequately address the subject matter of plaintiffs' common law claims.

As discussed above, a forum may be adequate even if it does not provide a plaintiff with causes of action that are identical to those plaintiff alleged in an American court. *See PT United Can*, 138 F.3d at 74 (unavailability of certain common law theories of liability does not render forum inadequate); *Fitzgerald*, 521 F.2d at 453 (even if recovery more difficult in England, forum is adequate); *see also Piper*, at 254 n.22 (unfavorable change in law does not preclude *forum non conveniens*). Although it appears that plaintiffs might not be able to recover in England on some of their common law claims, the essential subject matter of the dispute can be adequately addressed by an English court.

C. *Weighing of Gilbert Factors*

Judge Stanton found that the private and public interests involved in this case tilt in favor of trying the action in England. Plaintiffs argue that Judge Stanton abused his discretion in weighing the *Gilbert* factors.

1. *Public Interests*

Judge Stanton found that the public interests involved here favor neither New York nor England. He reasoned that New York has an interest in settling a dispute involving Worldcash, a New York corporation, and that England has an interest in resolving a dispute involving two of its major banks.

We agree that the public interest factors favor neither forum. Because both jurisdictions have some interest in this dispute, the concern with burdening jurors is not present. *See Peregrine Myanmar*, 89 F.3d at 47. The problems inherent in applying foreign law also are not implicated because the parties agree that American courts would apply American law and British courts would apply British law to this dispute. Finally, there is no indication that British courts are more or less congested than American courts, or that a judgment issued in either England or the United States would be unenforceable. Thus, Juge Stanton did not abuse his discretion in weighing the public interest factors. *See id.*

Plaintiffs argue that in assessing the public interest factors, Judge Stanton should have taken into account the United States' interest in applying the Sherman Act. *See Laker Airways v. Pan American World Airways*, 568 F. Supp. 811, 817 (D.D.C. 1983) (suggesting that U.S. interest in applying Sherman Act makes *forum non conveniens* inappropriate). However, we have never held that the United States' interest in applying its laws is a determinative factor to be considered in weighing convenience. *See Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993) ("United States courts have an interest in enforcing United States securities laws, [but] this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens"); *Cruz*, 702 F.2d at 48 (applicability of federal statute does not affect *forum non conveniens* analysis). Indeed, in *Transunion*, we upheld the *forum non*

conveniens dismissal of a RICO suit without even suggesting that the district court should have considered the United States' interest in the application of that statute. *See Transunion,* 811 F.2d at 129.

2. *Private Interests*

Judge Stanton found that the private interests strongly favor litigation in England. We agree.

As Judge Stanton found, most of the witnesses in this case reside in England, and the cost of transporting these witnesses to New York could be enormous. In addition, most of the documentary evidence in the case was created, and is stored, in England. Thus, conducting trial in the United States might impose significant burdens on the parties.

Moreover, if this case is tried in the United States, certain witnesses may be unavailable. Plaintiffs' central antitrust allegation against Barclays UK concerns a transaction that involved CCE, CCE's English affiliate Chequepoint UK, Barclays UK and another English bank. The employees of the non-party English bank are: (1) crucial to a trial of plaintiffs' claims against Barclays UK; (2) not subject to compulsory process in the United States; and (3) subject to compulsory process in England. Thus, Judge Stanton properly found that England was a more efficient and effective forum for trial of this dispute.

D. *Presumption in Favor of Plaintiffs' Choice of Forum*

Judge Stanton found that the presumption in favor of plaintiffs' choice was weakened in this case because the real party in interest is Chequepoint UK, a foreign corporation. *See Piper,* 454 U.S. at 255. Plaintiffs argue that Judge Stanton erred by concluding that a weak presumption applied in this case.

It is clear that, at bottom, this is a suit about two English banks' refusal to do business in England with CCE and Chequepoint UK. Plaintiffs have attempted to morphose this case into a dispute that concerns the United States by discussing the letter of credit issued by Barclays UK to CCE in New York. However, the letter of credit is a red herring. The gravamen of plaintiffs' claims concern: (1) Barclays UK's alleged ploy to force CCE and Chequepoint UK into default on an English checking transaction; (2) Barclays UK's subsequent refusal to provide banking services in England to CCE and its affiliates; and (3) NatWest UK's refusal to provide banking services in England to CCE and its affiliates. The real parties in dispute with the defendants are CCE and Chequepoint UK.

Because the real parties in interest are foreign corporations, there is not a strong presumption in favor of the plaintiffs' choice of forum. *See Piper*, 454 U.S. at 255. Thus, Judge Stanton properly concluded that England was the correct forum. We note, however, that even if the real parties in interest were American, we would find that Judge Stanton did not abuse his discretion in dismissing this suit, because the private interest factors weigh so substantially in favor of England.

CONCLUSION

Suits brought under the Sherman Act are subject to dismissal under the *forum non conveniens* doctrine. In this case, Judge Stanton did not abuse his discretion by dismissing the complaint on the ground that England is a more convenient forum. Accordingly, the judgment of the district court is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civil 6465(LLS)

CAPITAL CURRENCY EXCHANGE, N.V.,
d/b/a CHEQUEPOINT USA
and CHEQUEPOINT WORLDCASH, INC.,
Plaintiffs,

-against-

NATIONAL WESTMINSTER BANK PLC,
BARLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Defendants.

MEMORANDUM ENDORSEMENT

Plaintiffs Capital Currency Exchange, N.V. ("CCE"), a Netherlands Antilles corporation with its principal place of business in New York, and Chequepoint Worldcash ("Worldcash"), a New York corporation with its principal place of business in New York, assert antitrust claims under sections 1 and 2 of the Sherman Act against two English banks, Barclays Bank PLC ("Barclays") and National Westminster Bank PLC ("NatWest"), and against three English residents employed by those banks, Hamish Martin Vincent Gray (of NatWest), Lord Alexander of Weedon (of NatWest), and John Martin Taylor (of Barclays). Plaintiffs also claim that Barclays and Taylor breached a contract with them, interfered with their business opportunities, and breached fiduciary duties to them

as well as duties of good faith and fair dealing. Defendants move to dismiss the complaint on grounds of *forum non conveniens*, failure to state a claim, and lack of personal jurisdiction over the individual defendants.

Plaintiffs argue that the ground of *forum non conveniens* cannot be asserted in an antitrust action, and rely on *United States v. National City Lines*, 334 U.S. 573, 68 S. Ct. 1169 (1948), which held where venue was conferred by section 12 of the Sherman Act, dismissal on that ground was barred. Plaintiffs' argument is unavailing because they do not assert section 12 as a basis of venue in the complaint, nor could they with respect to the individual defendants, since section 12 confers venue with respect to corporations but not individuals.

England is an adequate forum for plaintiffs' claims because defendants are amenable to process there and plaintiffs may litigate the dispute there. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 & n.22, 102 S. Ct. 252, 265 & n.22 (1981). Their antitrust claims that defendants conspired to deny them banking services necessary to their business and thereby attempted to monopolize the international currency-transfer market can be asserted under Articles 85 and 86 of the Treaty of Rome which are incorporated in English domestic law, and it is a view "widely shared by jurists" that "infringements of Articles 85 and 86 give rise to an action for damages." (Alan Rupert Tyrrell Decl. ¶ 7.2.) They can also assert in an English court analogues of their common law claims against Barclays and Taylor, except for their claim that those defendants breached duties of good faith and fair dealing; the lack of an analogue for that claim does not reflect an inadequacy of available relief in the English courts, because plaintiffs' other common law claims challenge the same conduct on similar theories. Plaintiffs' English counsel suggests that there is doubt whether they could establish certain elements of the English analogues of their claims, but that potential lack of success on the

merits does not show that English courts do not provide for adequate litigation of the subject matter of the dispute.

While "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum," that presumption "applies with less force when the plaintiff or real parties in interest are foreign." *Piper*, 454 U.S. at 255, 102 S. Ct. at 265-66. The real party in interest with respect to many of the plaintiffs' allegations appears to be an English company with which they are affiliated. It was that affiliate that was refused services by NatWest, which had no direct relationship with plaintiffs. Barclays's refusal to renew a letter of credit issued on behalf of Worldcash is the only act it is claimed to have taken directly against either of the named plaintiffs; the vast majority of the claims against Barclays concern its decision to terminate services it had previously provided to plaintiffs' English affiliate, and other conflicts between Barclays and that affiliate. Accordingly, the presumption in favor of the plaintiffs' choice of forum has less force in this case.

Neither side has identified public interests strongly favoring or discouraging dismissal. New York has an interest in this controversy involving harm to a New York corporation, though England's interest appears greater since most of the conduct took place in England between English parties.

However, the private interests of the litigants strongly favor an English forum. Most significant is the potential cost of transporting dozens of witnesses to this forum from England, where it appears most of both parties' witnesses reside. Those witnesses include defendants' employees who were involved in the challenged decisions not to provide plaintiffs' English affiliate with services or who know of the alleged conflicts between Barclays and plaintiffs'

English affiliate. Defendants also identify as English witnesses many employees of plaintiffs' English affiliate who were involved in those conflicts. There also appears to be a need for testimony about English banking practices in view of plaintiffs' assertions that Barclays acted contrary to those practices in refusing to give references for plaintiffs' English affiliate and that it would have been consistent with those practices for NatWest to consult with Barclays in considering that affiliate's application for banking services; such testimony would likely come from English witnesses. In sum, it appears that there are many important witnesses in England.

Plaintiffs, in contrast, have identified few New York witnesses with personal knowledge of the conduct alleged in the complaint. They list as New York witnesses one employee of CCE and two employees of companies affiliated with plaintiffs, but do not explain what relevant knowledge those witnesses have. While they claim Barclays has employes in New York with knowledge about the decision not to renew Worldcash's letter of credit, they identify only one such witness. They claim that they will need several expert witnesses from New York to testify about "bond issues," "New York banking law," "the impact of trade on the US/NY," and damages, as well as three or four Worldcash customers to testify "to the preferability of Worldcash over other competitors" (Gregory Paul Turner Suppl. Decl. ¶¶ 5-6), but do not explain how those witnesses are material to the central issue of defendants' liability. Since most of their important witnesses in that respect appear to be in England with their English affiliate, it appears that transporting witnesses to this forum for trial would impose substantial cost on both sides.

The other private interests of the litigants also favor trial in England. Defendants say that most of the documents relating to the conduct alleged in the complaint is in England; plaintiffs have pointed to only a few documents in New York. Plaintiffs identify a few non-party

New York witnesses with knowledge about Barclays' refusal to renew the letter of credit, but Barclays lists several more non-party English witnesses with knowledge about the conflicts between Barclays and plaintiffs' affiliate, and the reasons the letter of credit was not renewed.

Because defendants have shown that the private interests of the litigants strongly favor trial in England and have overcome the (weakened) presumption in favor of the plaintiffs' choice of this forum, their motion to dismiss the complaint is granted on the ground of *forum non conveniens.*

So ordered.

Dated: New York, New York
August 28, 1997

/s/ Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

APPENDIX C

[Filed Nov. 17, 1998]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the —— day of November one thousand nine hundred and ninety-eight.

Dkt No: 97-9228

CAPITAL CURRENCY,
Plaintiff-Appellant,

v

NATIONAL WESTMINSTER,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Capital Currency.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 16th day of September, one thousand nine hundred and ninety-eight.

Before: Hon. Joseph M. McLaughlin
Hon. Fred I. Parker
Circuit Judges
Hon. Warren W. Eginton
District Judge *

Docket No. 97-9228

CAPITAL CURRENCY EXCHANGE, N.V.,
doing business as Chequepoint USA
and Chequepoint Worldcash, Inc.,
Plaintiffs-Appellants,

-v-

NATIONAL WESTMINSTER BANK PLC,
BARCLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Defendants-Appellees.

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* The Honorable Warren W. Eginton of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
CAROLYN CLARK CAMPBELL
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

Issued As Mandate: Dec. 7, 1998

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civil 6465(LLS)

CAPITAL CURRENCY EXCHANGE, N.V.,
d/b/a CHEQUEPOINT USA
and CHEQUEPOINT WORLDCASH, INC.,
Plaintiffs,

-against-

NATIONAL WESTMINSTER BANK PLC,
BARLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Defendants.

JUDGMENT

Defendants having moved to dismiss the Complaint on grounds of *forum non conveniens*, failure to state a claim, and lack of personal jurisdiction over the individual defendants, and the said motion having come before the Honorable Louis L. Stanton, United States District Judge, and the Court thereafter, on August 28, 1997, having issued its Memo Endorsed Order granting defendants motion to dismiss the Complaint on the ground of *forum non conveniens*, it is,

ORDER, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memo Endorsed Order, dated August 28, 1997, defendants motion to dismiss the

Complaint is granted on the ground of *forum non conveniens.*

DATED: New York, New York
September 3, 1997

JAMES M. PARKISON
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk